

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 12 CR 661

:

-against-

:

United States Courthouse  
Brooklyn, New York

MOHAMED YUSUF, :

Defendant. : February 4, 2015  
11:15 o'clock a.m.

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TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE SANDRA L. TOWNES  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH  
United States Attorney  
BY: RICHARD TUCKER  
SHREVE ARIAIL  
Assistant United States Attorneys  
271 Cadman Plaza East  
Brooklyn, New York

For the Defendant: DAVID STERN, ESQ.

Curcio Counsel: CESAR de CASTRO, ESQ.  
VALERIE GOTLIB, ESQ.

Court Reporter: Gene Rudolph  
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Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.

1 THE CLERK: Ms. Interpreter, please raise your right  
2 hand.

3 (The interpreter is duly sworn by the clerk. She is  
4 Magna Czagani.)

5 THE CLERK: Criminal cause for Curcio hearing,  
6 docket number 12 CR 661, United States of America versus  
7 Mohamed Yusuf.

8 Counsel, please state your names for the record,  
9 beginning with the government.

10 MR. TUCKER: Rich Tucker and Shreve Ariail for the  
11 United States.

12 Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. STERN: David Stern for Mr. Yusuf.

15 Good morning.

16 THE COURT: Good morning.

17 MR. de CASTRO: Cesar de Castro and Valerie Gotlib,  
18 Curcio counsel.

19 THE CLERK: Judge, we also have a Swedish  
20 interpreter for the defendant who has previously been sworn.

21 Please state your name for the record.

22 THE INTERPRETER: Magna Czagani.

23 THE COURT: Good morning everyone.

24 We are going to begin with the Curcio issue in this  
25 case. I have been informed in a letter dated January 15th

1 from the government that Mr. Stern advised the government that  
2 he had previously met with and interviewed --

3 MR. TUCKER: I'm sorry. I beg the Court's pardon.  
4 I don't mean to interrupt Your Honor.

5 In the government's letter, we indicated that we  
6 were requesting that the application or the notification be  
7 filed under seal.

8 THE COURT: Yes.

9 MR. TUCKER: We would request, and obviously  
10 whatever Your Honor wants to do we will follow, if we could  
11 refrain from referring to the witness by his name.

12 THE COURT: Yes.

13 MR. TUCKER: That would be, given the security  
14 concerns raised. I apologize for interrupting the Court.

15 THE COURT: No. Thank you.

16 And Mr. Stern, is your client aware of the name?

17 MR. STERN: My client has to be aware by virtue of  
18 this inquiry, but we have no problem about not mentioning the  
19 name in court.

20 THE COURT: All right. It is indicated that  
21 Mr. Stern, though he was not formally retained, confirmed that  
22 he did discuss with the potential witness information  
23 protected by the attorney-client privilege.

24 Your client is aware of that, Mr. Stern? You  
25 explained that to him?

1 MR. STERN: He is aware, both because I have told  
2 him and I assume Curcio counsel has told him as well.

3 THE COURT: All right. I am going to begin by  
4 asking Mr. Yusuf some questions.

5 How old are you, Mr. Yusuf?

6 THE DEFENDANT: I was born in 1983.

7 THE COURT: How old are you? That was my question.

8 THE DEFENDANT: Thirty-two.

9 THE COURT: Thank you.

10 How far did you go in school?

11 THE DEFENDANT: High school.

12 THE COURT: All right. Are you able to speak  
13 English at all?

14 THE DEFENDANT: To a certain degree, yes.

15 THE COURT: All right. But you do require the  
16 services of an interpreter when you are in court?

17 THE DEFENDANT: For certain legal procedures, yes.

18 THE COURT: All right. Are you satisfied with the  
19 interpretation that you have received?

20 THE DEFENDANT: Yes.

21 THE COURT: All right. Have you this morning, or  
22 within the last 24 hours, taken any drugs, any medicine, or  
23 pills or had any alcoholic beverage to drink?

24 THE DEFENDANT: No.

25 THE COURT: Do you understand why we are here today?

1 THE DEFENDANT: Yes. Yes, I do.

2 THE COURT: All right. Let me ask defense counsel,  
3 Mr. Stern, do you have any doubt as to the defendant's  
4 competence at this time?

5 MR. STERN: No.

6 THE COURT: And Curcio counsel, Mr. de Castro, you  
7 had an opportunity to speak with the defendant?

8 MR. de CASTRO: Yes, Your Honor.

9 THE COURT: Do you have any questions as to his  
10 competency at this time?

11 MR. de CASTRO: No, Your Honor.

12 THE COURT: All right. What about the government?

13 MR. TUCKER: Your Honor, the government has no  
14 relevant or fresh information with respect to the defendant's  
15 competency.

16 THE COURT: All right. Based upon the information  
17 provided to me by counsel, as well as my conversations with  
18 Mr. Yusuf so far this morning, I do find that he is competent  
19 to continue with this proceeding.

20 Mr. Yusuf, I just want to emphasis for you the  
21 seriousness of the charges that you are facing in this  
22 five-count indictment.

23 You have been charged with conspiracy to provide  
24 material support to a foreign terrorist organization. I am  
25 going to tell you about the penalties if you were convicted of

1 that charge.

2 In Count Two, providing material support to a  
3 foreign terrorist organization; and Count Three, attempted  
4 provision of material support to a foreign terrorist  
5 organization.

6 Pursuant to statute, the penalties for those crimes,  
7 if you were convicted, is fine or imprisonment up to 15 years  
8 or both with regard to the first three counts.

9 The fourth count, receipt of military-type training  
10 from a foreign terrorist organization, the statute indicates  
11 that a person convicted of this crime in Count Four shall be  
12 fined or imprisoned for ten years or both.

13 Finally, Count Five, unlawful use of firearms and  
14 the statute with regard to this crime indicates that if a  
15 firearm is proven to have been used and brandished not less  
16 than seven years, that's not less than, with a maximum of life  
17 pursuant to the statute; discharged, not less than ten years.  
18 If it is proven one or more of the firearms was a machine gun,  
19 not less than 30 years. Any sentence imposed after a  
20 conviction on Count Five would run consecutively, or after any  
21 sentence imposed on counts one through four.

22 Have you discussed that, the seriousness of the  
23 charges that you are facing, with your attorney?

24 THE DEFENDANT: Yes.

25 THE COURT: Okay. I am going to talk with you and

1 if at any time you do not understand something, or you have a  
2 question, consult your attorney or ask me any questions and we  
3 will clarify any question that you might have.

4 I have told you in the letter what the government  
5 has informed me the apparent conflict of interest in your  
6 lawyer's representation, that is, Mr. Stern.

7 I am looking for the letter. Here is the letter.

8 I did tell you, and again I will repeat, I am  
9 advised that Mr. Stern possesses privileged information about  
10 an individual whose case is closely related to yours and who  
11 may testify at your upcoming trial. This information could  
12 assist in your defense, that is, privileged information that  
13 the government tells me that Mr. Stern has.

14 I am going to talk to Mr. Stern in your presence in  
15 just a moment.

16 Mr. Stern may not disclose this information to you  
17 or his co-defense counsel because of his ethical duties. He  
18 may not rely on this information in any way as part of your  
19 defense team, including crafting trial strategies or in  
20 cross-examining the witness involved here. He has also  
21 determined that he will not cross-examine this other  
22 individual should the individual testify at your trial.

23 Let me say to you that the United States  
24 constitution gives every defendant the right to effective  
25 assistance of counsel. When one lawyer represents a defendant

1 and has represented a witness in the case in which the  
2 defendant is being tried, the lawyer may have trouble  
3 representing you and that prior client of his. That is  
4 because he owes to you a duty of loyalty, a duty to keep your  
5 confidences, and he also owes that same duty to the prior  
6 client. Once the representation ceases, the duty remains, the  
7 duty of loyalty and confidentiality.

8 Do you understand what I am saying?

9 THE DEFENDANT: Yes.

10 THE COURT: Okay. Before I get talking to you about  
11 the law, I have some questions that I want to ask your  
12 attorney because the law is clear that if there is a conflict  
13 of interest of any kind, the attorney may not be in a position  
14 to give unbiased advice to you, the client, about such matters  
15 as whether or not to testify or to plead guilty and cooperate,  
16 since plea or cooperation from you could result in some harm  
17 to the former client. The defense of you could be impaired  
18 because vital cross-examination becomes unavailable to you,  
19 that is, if there is information that is learned from  
20 confidences given to Mr. Stern.

21 Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: All right. The conflict regards the  
24 ability to cross-examine a former client who is a witness  
25 testifying against a defendant at the trial.

1           Mr. Stern, did you actually represent the witness at  
2 any court proceedings?

3           MR. STERN: No.

4           THE COURT: Can you tell me what this representation  
5 included?

6           MR. STERN: Yes.

7           It wasn't really representation. This witness  
8 reached out to me, I am not sure from what source, asked if I  
9 would come speak to him about being retained by him. I told  
10 his lawyer that I was going to go talk to him. I did go talk  
11 to him. And then he -- I don't know the reason. I think  
12 among the reasons, he didn't have the money, didn't retain me.

13           So that was the end of our relationship, to the  
14 extent it was a relationship. I did not represent him. We  
15 did discuss his case to some extent.

16           MR. TUCKER: Your Honor, if I may? I could just  
17 perhaps supplement that.

18           I obviously had an opportunity to speak with the  
19 witness and the witness has indicated, without going into any  
20 of the detail of his discussions with Mr. Stern, that they  
21 occurred on multiple days and that they were substantial. So  
22 I obviously don't know the substance of the discussion but I  
23 do know that the discussions were substantial.

24           I am also aware that these conversations took place  
25 well before Mr. Stern was appointed in this case in

1 January 2014. Of course, the government didn't learn of the  
2 conflict until Mr. Stern disclosed it in December of 2014. If  
3 we had been aware of the conflict at the time of his  
4 appointment, I imagine that we would have been having a very  
5 different discussion than we are today. But here we are.

6 But I want to make clear that based on what I have  
7 been told, this was not a brief conversation by any means.  
8 There was meat on the bone.

9 MR. STERN: Your Honor, I am not going to get into a  
10 dispute with my client. I met with him two times. I suppose  
11 what's considered "substantial" is subject to interpretation.  
12 But as soon as I became aware that the government was going to  
13 call this person, or might call this person, I informed them.

14 I stand by what I have said to you.

15 THE COURT: All right. Did you ever interview the  
16 witness with respect to any facts relating to this case? I am  
17 not going to go into what you said and what he said. But  
18 generally?

19 MR. STERN: I am going to say no to that, although  
20 at the time I had never heard of this case. So --

21 THE COURT: Now you have heard of it.

22 MR. STERN: I don't recall anything he said that has  
23 to do with this case. I suppose potentially he mentioned  
24 times relevant to this case. But he certainly didn't mention  
25 this client, or at least not that I know of.

1 Is that the government's --

2 MR. TUCKER: Again, Your Honor, I don't know and I  
3 didn't ask for the substance of the discussions. What I can  
4 represent to the Court is that this witness was a  
5 coconspirator with Mr. Yusuf, that they fought together with  
6 al-Shabaab, and at the time Mr. Stern would have met with the  
7 witness he would have been charged with offenses relating to  
8 that criminal conduct.

9 I have no idea what they actually discussed but  
10 obviously the government is very troubled. I would just add,  
11 that while we are obviously eager to protect the contents this  
12 particular witness may testify in this case, it is a matter of  
13 public record that this witness is cooperating with the United  
14 States more broadly.

15 So I am not exactly certain what Mr. Stern learned  
16 in December of 2014 that he would not have known when he was  
17 appointed in this case. I will take him at his word, but the  
18 government is obviously very troubled now and we are frankly  
19 concerned by the nature of the overlap here.

20 MR. STERN: That's kind of you, to take me at my  
21 word. I appreciate that.

22 I had no way of knowing that this witness was going  
23 to testify in this case, and if they think different they  
24 could give us discovery earlier and then we would know.

25 THE COURT: All right.

1           MR. STERN: So I am not sure what they are trying to  
2 say here.

3           THE COURT: Calm down. Really, I am not going to  
4 deal with this.

5           MR. STERN: I am not going to have him say things  
6 about me or imply things about me that are untrue.

7           THE COURT: You may respond. But calm down.

8           MR. STERN: I am calm, Judge.

9           THE COURT: Respond.

10          MR. STERN: I am very calm.

11          THE COURT: All right. Did you ever interview the  
12 witness with respect to his background concerning issues that  
13 may be used on cross-examination?

14          MR. STERN: I talked with the witness about the  
15 reasons he was in jail here and I'm sure that included his  
16 background.

17                You know, the government can ask him about the  
18 things we talked about. He can waive his attorney-client  
19 privilege and tell them anything they want to know. He may  
20 have a better memory of it than I do but I'm sure I did talk  
21 to him about his background.

22          THE COURT: All right. You say you met with him  
23 twice. How long did this representation continue?

24          MR. STERN: I would say, I met with him twice within  
25 about a one-month period. I would have to get records from

1 the jail. I could get visiting records and know exactly what  
2 dates it was.

3 THE COURT: I would like to do that.

4 MR. STERN: So we could get those by subpoena or  
5 maybe the government could just get them. I don't know. But  
6 there are records of each time I visited him because I have to  
7 fill out forms. I would say, it was within a one-month  
8 period. It could be six weeks. But in that ballpark. I  
9 would say the meetings were between an hour-and-a-half and two  
10 hours.

11 THE COURT: All right. After that period, did you  
12 have any further role in representation of this witness?

13 MR. STERN: No.

14 The lawyer he had who was a person I know continued  
15 to represent him and I think continues to represent him. I  
16 may be wrong about that. But I think the same lawyer still  
17 represents him.

18 THE COURT: All right. Mr. Yusuf, you understand  
19 that I am asking these questions because the lawyer's ability,  
20 Mr. Stern's ability, to cross-examine a witness is often  
21 limited because of confidential information received during  
22 the attorney's prior representation of the witness.

23 Do you understand that?

24 THE DEFENDANT: Yes.

25 THE COURT: All right.

1 MR. STERN: Judge, I have told Mr. Yusuf that I  
2 think because it would have the appearance of impropriety, I  
3 don't intend to cross-examine this witness. My co -- I don't  
4 mean my immediate cocounsel. I mean, counsel for the other  
5 defendants I assume will cross-examine him. Although I can't  
6 tell them what to do, but I will not cross-examine him.

7 MR. TUCKER: Your Honor, I would just add -- I could  
8 sit down.

9 THE COURT: I have a question.  
10 Are you saying no one will cross-examine this  
11 witness for Mr. Yusuf?

12 MR. STERN: That is what I am saying.

13 MR. TUCKER: Your Honor, that's deeply troubling for  
14 the government.

15 THE COURT: Yes, deeply troubling to this Court too.

16 MR. STERN: I am not sure there will be occasion for  
17 any of us to. I think what we need to do will be covered by  
18 lawyers for the other defendants. I haven't seen the  
19 discovery yet. So I certainly will not cross-examine him. I  
20 certainly will not.

21 MR. TUCKER: Your Honor, Mr. Yusuf is represented by  
22 two attorneys.

23 THE COURT: Yes. What about the other counsel?

24 MR. STERN: I suppose if we thought there was a real  
25 need to, my cocounsel could cross-examine him. Obviously

1 without help from me about privileged information. But until  
2 I see discovery I won't know if that's necessary or not.

3 THE COURT: Do you understand that, Mr. Yusuf?

4 THE DEFENDANT: Yes.

5 THE COURT: The possibility that this witness would  
6 not be cross-examined by an attorney representing you?

7 THE DEFENDANT: Yes, I do understand.

8 THE COURT: Okay.

9 MR. TUCKER: Your Honor, I think that the Court is  
10 going in the same direction at least that I am thinking. I  
11 would hate to be dealing with this problem again in the middle  
12 of trial.

13 THE COURT: Yes.

14 MR. STERN: This problem won't be resolved until we  
15 see the discovery, until we see the 3500 material and know  
16 what, if anything, this witness has to say about Mr. Yusuf. I  
17 don't know.

18 THE COURT: I understand that. But to say at this  
19 point that you don't expect that Mr. Yusuf will have an  
20 attorney who cross-examines this witness?

21 MR. STERN: I think there is a likelihood that we  
22 won't need to, yes. Again, I don't know what the witness is  
23 going to say about him.

24 THE COURT: Yes. The problem I am having is that  
25 you are making this decision, first of all, with regard to

1 this witness at this period of time. As I was reading the  
2 letter from the government, they indicated to me that one of  
3 your, or your cocounsel would handle all matters with regard  
4 to cross-examination of this witness, including deciding  
5 whether or not to --

6 MR. STERN: I don't think I am barred from helping  
7 her decide whether or not based on material we are given. I  
8 don't think I am barred from reading that material and  
9 discussing that material with her. I think what I am barred  
10 from doing, and I agree that I am barred from doing, is to  
11 talk about things that I know as a result of my prior, what we  
12 are loosely calling representation of this person. So I don't  
13 think we have any disagreement about that.

14 But I think if we are given 3500 material, I am able  
15 to read it and to talk with my cocounsel about it. I don't  
16 see what bar there is to that.

17 THE COURT: As long as you are not disclosing any  
18 confidences --

19 MR. STERN: I wouldn't discuss anything not  
20 contained in that 3500 material.

21 THE COURT: No. This is what I am saying. I don't  
22 know whether anything contained in the 3500 material will be  
23 relevant to the conversations that you have had with your  
24 former client.

25 MR. STERN: If it's duplicative of those

1 conversations, it's now been provided to us. If it's not, I  
2 won't use anything I have learned from contacts with that  
3 person.

4 THE COURT: Okay. Have a seat.

5 The Second Circuit has recognized that a serious  
6 problem arises when there is substantial risk that the  
7 lawyer's representation of the client would materially and  
8 adversely be affected by the lawyer's duties to a former  
9 client. This is because a lawyer owes an absolute duty of  
10 loyalty and confidentiality to his former client. I am  
11 reading from United States versus Yannotti, at 358 F. Supp 2d  
12 289 at page 295.

13 The duty which remains in force even after  
14 representation ends precludes the lawyer from disclosing  
15 matters revealed to him by reason of the confidential  
16 relationship absent release from that duty under law.

17 That means that a lawyer cannot use privileged  
18 information obtained from his former client during prior  
19 representation that would adversely affect that client in the  
20 present proceeding, see United States versus James,  
21 708 F2d 40. That's a Second Circuit case also.

22 Thus, in representing his current client, a lawyer  
23 cannot attack his former client through cross-examination or  
24 argument to the jury, United States versus Pizzonia,  
25 415 F Supp 2d 168 at pages 177 to 178.

1           Because of the attorney's prior representation of  
2 the witness, the attorney cannot ethically cross-examine the  
3 cooperating witness without his consent.

4           As I read this, I find, Mr. Stern, that you cannot  
5 even with your cocounsel be involved in preparing for  
6 cross-examination of him or cross-examine him.

7           MR. STERN: I don't think that's what the  
8 proposition stands for, Judge.

9           THE COURT: I am ruling that it does.

10          MR. STERN: So that I -- I shouldn't or may not read  
11 the discovery as to this witness and may not confer with my  
12 cocounsel about ways he should be cross-examined based solely  
13 on information provided by the government?

14          THE COURT: Correct.

15          MR. STERN: I have no choice but to abide by your  
16 ruling.

17          THE COURT: I would also refer to United States  
18 versus Falzone, 766 F. Supp 1265 at page 1275. That is a  
19 Western District of New York 1991 case, finding it improper  
20 for an attorney to cross-examine his prior client because the  
21 attorney is in a position to use information gleaned from the  
22 prior representation either purposely or inadvertently. That  
23 is why I am making this ruling.

24          All right. Mr. Yusuf, based upon the questions that  
25 I have asked Mr. Stern, do you understand that with regard to

1 this witness, Mr. Stern will take no part in questioning or  
2 cross-examining or investigating this witness?

3 THE DEFENDANT: Yes, I understand.

4 THE COURT: That is because of that prior  
5 representation.

6 THE DEFENDANT: Okay. Yes.

7 THE COURT: Do you also understand that Mr. Stern  
8 said that possibly no one would cross-examine the witness for  
9 you. However, we have determined here that the lawyer who  
10 does the cross-examination will make that decision.

11 THE DEFENDANT: Okay. Yes, I understand.

12 THE COURT: All right. Do you have any questions  
13 about that at all?

14 THE DEFENDANT: Will anybody from my attorney's side  
15 be able to cross-examine?

16 THE COURT: Yes. You have two attorneys.

17 THE DEFENDANT: Okay. Okay.

18 THE COURT: All right. We have determined, and  
19 Mr. Stern has assured me that he will not make that  
20 determination, the other attorney who has had no contact with  
21 this witness will.

22 THE DEFENDANT: Yes, I understand. That's okay.

23 THE COURT: All right.

24 MR. TUCKER: Your Honor, one question, based on the  
25 Court's ruling.

1           The government in anticipation of the depositions  
2 later this month anticipates turning over some of the 3500  
3 relating to this witness along with obviously the 3500  
4 relating to the witnesses to be deposed, to provide context  
5 for counsel as well as to address some potential Giglio  
6 issues.

7           I just want to be clear from the Court's ruling,  
8 will Mr. Stern also be precluded from reviewing this witness'  
9 3500 generally? One would imagine there would be very little  
10 point if he is not going to be able to participate in the  
11 cross-examination. I think that would be the government's  
12 view. Because that same divided duty of loyalty would be  
13 triggered if he were to observe inconsistencies or  
14 consistencies between things that he said or that he spoke  
15 about with the witness and the 3500 that the government  
16 discloses.

17           I just want to make certain that at least I  
18 understand the Court's ruling in that respect and make sure we  
19 thought that through.

20           THE COURT: I didn't address that. Because you are  
21 telling me this for the first time --

22           MR. TUCKER: Of course, Your Honor.

23           THE COURT: -- this morning.

24           MR. TUCKER: I apologize.

25           THE COURT: I could not address it.

1 I think what I am going to have to do, and I hate to  
2 have you come back again, is that I am going to have to stop  
3 at this point and address those issues. Then we'll have to  
4 talk more about it, just so that I can decide this issue. It  
5 is one I have not thought about before because it hasn't been  
6 mentioned to me before.

7 MR. TUCKER: Absolutely, Your Honor. I apologize.

8 I am also processing the information, that it's  
9 possible that no one from Mr. Yusuf's defense team would  
10 cross-examine this witness.

11 I can also, just for the Court's edification,  
12 provide just a small bit of additional context.

13 This witness was Mr. Yusuf's commander in al-Shabaab  
14 for a period of time and supervised him and one of his  
15 codefendants in combat in Somalia. So their relationship was  
16 somewhat intimate. And, obviously, Mr. Yusuf and his  
17 codefendants did different things at different times and they  
18 had contact with this witness at different times.

19 As I am sort of thinking about what Mr. Stern has  
20 said today, there will certainly be, or I expect there will be  
21 testimony from this witness that is specific to Mr. Yusuf  
22 where he may not address his codefendants. That's where I was  
23 sort of surprised about the idea that no one might want to  
24 cross-examine the witness on Mr. Yusuf's behalf.

25 I think probably the additional time would be useful

1 because Curcio counsel could discuss this further with  
2 Mr. Yusuf as well because I think it's a bit of a dynamic that  
3 maybe we hadn't thought through all the way yet.

4 MR. STERN: Let me just say to the last point that  
5 was raised by the government about -- information about the  
6 person we are talking about and its relevance to other  
7 witnesses. I don't think I could really fairly represent  
8 Mr. Yusuf if I am not allowed to find out whether there are  
9 inconsistencies between government witnesses that I intend to  
10 elicit through one witness as opposed to another.

11 So to give you an example, witness A, who is the  
12 witness who at one time I had spoken with, says -- I don't  
13 want to make things up -- says something. And witness B says  
14 something different. I might want to elicit that fact from  
15 witness B because I know that it's inconsistent with what  
16 witness A said.

17 THE COURT: Wait. Witness A is the client you  
18 formerly represented?

19 MR. STERN: Correct.

20 In 3500 material there is a statement of him saying  
21 whatever. Witness B says something different. I would need  
22 to elicit that statement from witness B to effectively  
23 represent Mr. Yusuf. My cocounsel would need to elicit the  
24 inconsistent statement of witness A to effectively represent  
25 Mr. Yusuf.

1           So that I don't see how, if there are what the  
2 government characterizes as Giglio, I don't know what it is,  
3 some kind of inconsistencies between these two witnesses, I  
4 can't possibly effectively represent Mr. Yusuf if I am also  
5 precluded from cross examining those witnesses about what may  
6 be inconsistencies. Again, I haven't seen the material. I am  
7 not saying these things do or don't exist. It seems from what  
8 the government said they may exist.

9           Am I making myself clear? It is hard because we  
10 can't talk about --

11           THE COURT: Yes, you are making yourself clear.

12           Issues are arising that I had not thought of before.

13           MR. ARIAIL: Your Honor, if I may just raise one  
14 more issue that I hadn't thought of as well, which is to the  
15 extent that Mr. Stern is unable by his prior representation to  
16 cross-examine witnesses that we intend to call in our  
17 depositions, which are fast approaching, then I think  
18 Miss Simkin Smith needs to begin preparing for that role as  
19 opposed to Mr. Stern so that we can move forward on the track  
20 that we had previously set forth.

21           As Your Honor is aware, the logistics of setting two  
22 depositions in these two countries has been extraordinarily  
23 difficult. I would just want to make sure that we were  
24 continuing to hold those dates regardless of how this is  
25 unpacked, and in particular since Mr. Yusuf is represented by

1 two able counsel.

2 MR. STERN: Judge, Ms. Simkin Smith I don't think  
3 has ever cross-examined a witness in her life. She is on this  
4 case doing a wonderful job writing. But I don't think she's  
5 ever cross-examined a witness.

6 MR. TUCKER: Your Honor, I don't know. I don't know  
7 how we exactly process that.

8 MR. STERN: Process by listening and understanding  
9 the simple words. She's never cross-examined a witness.

10 THE COURT: Maybe we need another attorney. I've  
11 got to make that decision.

12 What day of the week is it?

13 THE CLERK: It's Wednesday.

14 THE COURT: What about Monday morning while jury  
15 selection is being done in another case?

16 MR. TUCKER: Your Honor, we are available whenever  
17 the Court needs.

18 Obviously, the government's goal here is I think the  
19 same as everyone's goal, which is to make certain that  
20 Mr. Yusuf has adequate and effective representation.

21 THE COURT: What about you, Mr. Stern? Monday  
22 morning?

23 MR. STERN: Monday morning is fine for me. I have  
24 something at 3:30 which I assume this will not interfere with.

25 THE COURT: Hopefully not.

1 Mr. de Castro, what about you?

2 MR. de CASTRO: Judge, I have a potential conflict  
3 in another court appearance in the morning at 9:30. I could  
4 do a late morning.

5 THE COURT: What does late morning mean? Give me a  
6 time.

7 MR. de CASTRO: Like 11:30. But I understand the  
8 Court has a jury out. I can find out if my cocounsel on that  
9 case can cover.

10 THE COURT: Please do.

11 MR. de CASTRO: I just have to call him.

12 THE COURT: Please do. Do you want to do that?

13 MR. de CASTRO: I can do that right now.

14 (Pause.)

15 MR. de CASTRO: Judge, I haven't been able to get in  
16 touch with the lawyer but I'll do what I have to do. I can be  
17 here Monday morning.

18 THE COURT: All right. Ms. Smith?

19 THE CLERK: She hasn't returned my email yet, Judge.

20 (Pause.)

21 THE COURT: I want to finish this before we do  
22 anything else. We will put this on for Monday. Because of  
23 the continuation of the hearing and my need to do some  
24 research to address these issues that have arisen that I was  
25 not aware of, the time is excluded.

1 MR. TUCKER: Thank you, Your Honor.

2 With the Court's permission, I would like to go back  
3 and confer with our ethics advisor and potentially put in a  
4 letter as well. There have been some new facts that have come  
5 to light that I would like to take a more reasoned position on  
6 which may help the Court.

7 THE COURT: All right. And certainly, if you would  
8 like to submit anything, you may do so.

9 MR. STERN: Thank you.

10 THE COURT: Thank you. We are adjourned.

11 (Matter concludes.)  
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